No. 13941

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CHARLES WILLIAM AFFELDT, JR.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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POINT TWO

The reopening of the conscientious objector classification by the local board and the giving of the I-A classification to appellant purely because he declined to fill out the duplicate conscientious objector form were arbitrary, capricious and an abuse of discretion by the local board so as to deprive appellant of his rights under Section 1625 of the regulations. 30-36

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BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [4-6][1] The district court made no specific findings of fact. These

[1] **Numbers appearing in "brackets" herein refer to pages of the printed Transcript of Record filed herein.**

were waived. So were conclusions of law. The trial court stated orally the brief reasons for his decisions. [49-50]

The trial court found the appellant guilty. [49-50] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [6-7]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified he was ordered to report for induction. It is then alleged that on or about November 13, 1952, appellant did knowingly fail and refuse "to be inducted into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty. At the trial he waived the right of trial by jury. Findings of fact and conclusions of law were also waived. [9]

Appellant subpoenaed the production of the secret FBI investigative report made pursuant to Section 6(j) of the act. Evidence was received at the trial. [9-43] Upon the trial the secret FBI investigative report was offered into evidence when produced by the Government. The objection of the Government was sustained after the court examined the FBI report *in camera*. The document was excluded on the grounds that it was privileged and that the confidential privilege of the Attorney General overruled the materiality of the document. [25-32]

A motion for judgment of acquittal was made at the close of all the evidence. [12-18, 45-49] The court denied the motion for judgment of acquittal. [49-50] The court found the appellant guilty. [50] The appellant was sen-

tenced to serve a period of four years in the custody of the Attorney General. [4-6] Notice of appeal was timely filed. [6-7] The transcript of the record (including statement of points relied upon) has been timely filed in this Court.

THE FACTS

Appellant was born on September 11, 1926. (1)[2] He registered with his local board on September 10, 1948. (2) The board sent him a classification questionnaire. He requested additional time in which to fill it out. (3, 16) The questionnaire was filed with the local board on November 18, 1948. (4)

In the questionnaire the appellant gave the board all the information required by law. He showed his name and address. (5) He answered that he was a minister of religion under Series VI. He said that he did regularly serve as a minister. He said that he had been serving as such since September, 1939. He stated that he was not formally ordained, however. (6)

Appellant showed that he was a field clerk for the Southern Counties Gas Company. He said that he earned $1.50 per hour and worked 40 hours per week. (8)

Appellant showed that he was born in Los Angeles on September 11, 1926. He answered that he had been convicted of a felony. He showed that he had been convicted of violating the Selective Training and Service Act of 1940. He showed this conviction occurred in 1945. (9)

The appellant signed Series XIV. Here he certified that he was a conscientious objector. He asked the local board to mail to him the special form for conscientious objector. (10)

The local board mailed to him the special form for conscientious objector. This was filled out by Affeldt and filed with the local board on November 18, 1948. In it he signed

[2] **Numbers appearing in "parentheses" refer to pages of the draft board file. The numbers are written in longhand at the bottom of each page and are circled.**

Series I(B). (17) He stated that he believed in the Supreme Being. He then described the nature of his belief in the Supreme Being. He showed that his obligations to God were higher than any of those that arise from human relations. He then added that under God's law he could not engage in the affairs of this world or participate in wars of this world. He showed that God's law was supreme. He said that if it conflicted with the law of man he must obey God's law, rather than that of man's. (17)

He showed the local board that he had been reared as one of Jehovah's Witnesses by his parents. He showed that he got his conscientious objections from their teaching and from the study of the Bible. (18)

He stated that although he relied upon no particular person for religious guidance, he did depend entirely upon the Bible as his guide. (18) He said that he believed in self-defense. He showed the only time that he believed in the use of force was in self-defense. (18) He answered that he had given public expression to his belief by testifying in federal court in Los Angeles on April 4, 1945, when he was tried and convicted of violating the Selective Training and Service Act of 1940. (18)

Affeldt then listed the schools he had attended, the employers for whom he had worked and the places where he had lived. (18, 23)

Affeldt showed that both of his parents were Jehovah's Witnesses. He answered that he was a member of a religious organization, Jehovah's Witnesses. He showed that the Watchtower Bible and Tract Society was the legal governing body of that group. He said that he had been taught the beliefs of Jehovah's Witnesses since he was a child. He gave the name of his church and its address. He showed that W. J. Drewelow was the presiding minister of the congregation that he attended. (23) He then gave the names of several persons as references. (24)

In the form he referred to an attached booklet entitled "Neutrality" and also he attached to the special form for

conscientious objector a separate letter, written in longhand. (20-22)

In his separate letter he stated that he had grown up in the faith of Jehovah's Witnesses. He showed that he had served the Lord since 1939 as a minister. He said that he had given public evidence of the symbolization of the covenant he had made to serve the Lord. He stated that he had been ordained. He then explained fully about the ways and means that he had been carrying on the preaching work as one of Jehovah's Witnesses. He explained that it was a legal and proper method of preaching. (19-20)

He showed that he had attended the Theocratic Ministry School for his training. He stated that he had never attended a theological seminary, but that his attendance at the Watchtower training school was adequate and sufficient to prepare him for his ministry. (20) He described the classes of instruction that he attended and the time that he spent preparing for his ministry. (21) He again stated that it was wrong and contrary to his belief in the Bible to have any part in the affairs of this world. He said that he could not serve two masters. He chose, therefore, to be a soldier of Christ Jesus and not of this world. He said that Jesus taught brotherly love. Because of his beliefs in the teachings of Jesus and Jehovah, he stated that it was impossible for him to engage in any warfare carried on by the nations of this world. (22)

On November 22, 1948, Affeldt filed a dependency form showing that he had three dependents. (26-27) As a result of this the local board, on November 30, 1948, classified him in Class III-A. (11)

Because of a change in the law and a reduction in the number of his dependents he was taken out of the deferred classification of III-A and placed in I-O on October 23, 1951. (11, 29-32, 33) He was notified of the I-O classification on October 24, 1951. (11) This classification made appellant liable for the performance of civilian work contributing to

the national safety, health and interest in lieu of induction into the armed forces.

After he was ordered to report for his preinduction physical examination he was examined and was found to be acceptable. (11, 34) He requested a personal appearance. (11, 35) The board granted it and fixed the hearing for November 6, 1951. (11, 36)

At the hearing Affeldt appeared. (11, 40) The memorandum showed that Affeldt requested the minister's classification of IV-D. It showed too that he was employed full time with the Southern Counties Gas Company. It recognized his contention that he claimed it to be his vocation. The board found, however, that it did not warrant giving him the IV-D classification. The local board continued the I-O classification. He was notified officially of the classification. (11, 40)

The Gas Company filed a letter requesting reconsideration of his case. The board reconsidered his case. There was no change. (11, 37-38, 43)

Affeldt filed with the local board, on November 15, 1951, a petition signed by twenty people. (11, 45) The petition certified that he was one of Jehovah's Witnesses and actively engaged in preaching. (11, 45) The file was forwarded to the appeal board on November 16, 1951. (11) The appeal board on December 11, 1951, classified him in I-O. This classification, like that given to him by the local board, required him to do civilian work in lieu of induction into the armed forces. (11, 47-47 I) He was notified of this classification. (11, 13)

The local board mailed to appellant on December 13, 1951, a revised form for conscientious objector. (11, 48) He refused to fill out the revised form. He wrote the board a letter and told them that, while he was a conscientious objector, he could not conscientiously fill out the form and sign Series I(B) because it called upon him to agree to doing the alternate civilian work. He said that he was in a

covenant with God and that doing this sort of work could cause him to violate his covenant. (12, 49, 50-53)

The local board then obtained clearance from the armed forces to have him accepted by the army notwithstanding his conviction for violation of the Selective Training and Service Act of 1940. This clearance came through on February 7, 1952. (12, 54) He was given a preinduction physical examination, found acceptable and mailed a notice thereof. (55) On the same date the local board made a memorandum indicating that it was the continuous duty of Affeldt to make out the new form and that since he had refused to do it the local board reopened his case, according to the memorandum. He was classified in I-A because of his refusal to fill out the new form. (56) After he received notice of this he requested a personal appearance on February 27, 1952. (12, 57) The local board fixed the hearing for March 4, 1952. (12, 50)

On March 4, 1952, Affeldt appeared before the local board and testified that he had quit secular work. He said that he was now only working part time at odd jobs. He then added that he was devoting his full time to the ministry. The local board found that, notwithstanding his full-time devotion to the ministry, he was not entitled to the minister's classification because he "is not an ordained minister." (12) The local board continued his I-A classification on March 4, 1952, and notified him on the same day of this action. (12)

Upon receipt of the I-A classification Affeldt wrote a letter appealing his classification. In this letter he stated that the local board, at the personal appearance, demonstrated that it was prejudiced against him and classified him I-A solely because he refused to sign the revised special form for conscientious objector. He again reiterated the facts showing that he was a full-time minister and stated that, nevertheless, he was still a conscientious objector, even if he did not sign the revised form. He then explained fully why he could not sign the form. He showed that he

could not do work as a conscientious objector because he was a minister. He said that he should not have been asked by the local board to agree to do what conflicted with his conscience. (60-61) This letter of appeal was received by the board in time. (12) His file was mailed to the appeal board on March 18, 1952. (12)

The appeal board made a preliminary determination that he was not entitled to the conscientious objector status. Minutes were entered on the back of the questionnaire. (12) His file was forwarded to the Department of Justice. (63)

On June 17, 1952, the local board wrote a letter to the appeal board urging it to make an early determination of his case and hasten the return of the file to the local board because the local board was anxious to induct the registrant. (64) The appeal board wrote back that the file was with the Department of Justice. (65, 65 A) The chairman then replied that the file must be returned to the local board not later than August 28, 1952, in order that the appellant could be inducted before he reached his 26th birthday. (66)

The district attorney wrote the local board that he was heard before the Department of Justice on July 30, 1952, and the file was sent to Washington on that date. (67) The Department of Justice, in response to an inquiry made by the district attorney to hasten the case, stated that Affeldt would be liable until he was 35 years of age because of his deferment on account of dependents. (67, 68)

On August 29, 1952, the local board issued an order for Affeldt to report for induction on September 9, 1952. (13, 69) On the same date it postponed induction to permit the completion of the appeal. (13, 70)

Because Affeldt could not continue in the full-time ministry work he was forced to resume full-time secular work. His employer made an application for deferment because he was devoting 40 hours a week to his work. (13, 73) This request for deferment was denied. (13, 74)

T. Oscar Smith, Special Assistant to the Attorney General, made a report and recommendation to the board of

appeal on September 9, 1952. In his recommendation he recited the hearing before the hearing officer. He found that Affeldt was one of Jehovah's Witnesses and that he based his conscientious objections on the teachings of Jehovah's Witnesses and his personal study. He mentioned that the FBI secret investigative report showed a conviction and incarceration. He then said that the FBI report showed that all informants said Affeldt was sincere. He then added that while he was a sincere conscientious objector he would use force in self-defense and for the protection of his relatives and others of Jehovah's Witnesses.

The Special Assistant to the Attorney General referred to the fact that the hearing officer examined Affeldt closely on his belief in self-defense. He found that Affeldt told the hearing officer he would defend his brothers to the extent necessary under the circumstances. The Special Assistant to the Attorney General referred to the fact that Affeldt said he was not a pacifist. It was then concluded by the Attorney General that Affeldt was not entitled to the conscientious objector status because, since he was not a pacifist, he "is not opposed to war in all its forms, but rather will fight in the defense of brethren." He said that the appellant was not entitled to the conscientious objector classification. He recommended that the claim be not sustained. (71-72) This report was returned to the appeal board. On September 25, 1952, the appeal board classified appellant in Class I-A. (76 I) The file was returned to the local board and on October 2, 1952, he was notified of this classification. (13, 77)

Affeldt, on October 17, 1952, was ordered to report for induction on November 13, 1952. (13, 78) On November 7, 1952, he appeared before the local board and informed the board that he would not report for induction. He said that his religion prohibited him from bearing arms against another. He indicated that he would take conscientious objector work providing he had week ends open for preaching.

On November 13, 1952, he reported at the induction station and refused to submit to induction. (84, 85)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objection to participation to both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the state. He showed that his beliefs were not the result of political, philosophical, or sociological views, but that they were based solely on the Word of God. (17-24)

He attached documents to his conscientious objector papers showing fully his views.

The local board granted the conscientious objector status. He was placed in Class I-O. (11) After a personal appearance his conscientious objector status was continued. (11, 33) On appeal the appeal board continued appellant in Class I-O, on December 11, 1951. (11, 47 I) On February 19, 1952, the local board placed appellant in Class I-A. Appellant appealed to the appeal board.

A secret investigation was conducted by the FBI and apparently the report made to the Department of Justice fully corroborated the claims of Affeldt to sincerity and the good faith of his conscientious objections. (71-72)

The Special Assistant to the Attorney General recommended to the appeal board that Affeldt be denied his conscientious objector status notwithstanding his sincerity because he was willing to fight in defense of his brothers and to use force in self-defense. The Special Assistant to the Attorney General apparently concluded that because he was willing to use force in defense of himself and his brothers he was not opposed to war in all its forms. (71-72)

The appeal board followed the recommendation and

placed Affeldt in Class I-A. (76 I) Affeldt was notified of this final classification. (13, 77)

On the trial, in the motion for judgment of acquittal, it was contended that there was no basis in fact for the denial of the conscientious objector classification. [12, 15] It was also contended that the recommendation of the Special Assistant to the Attorney General was illegal, arbitrary, capricious and in violation of the law. [17, 45] The motion for judgment of acquittal was denied. [49-50]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation by the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

II.

Affeldt had been twice classified I-O. The local board had found him to be a conscientious objector. The appeal board had classified him as a conscientious objector. (11, 33, 47 I) The local board mailed to him a revised special form for conseeintious objector, identical to the original form that he had filled out, save and except an agreement to do civilian work in lieu of induction. (11, 48) Appellant returned the form unsigned. (12, 49, 50-53) He explained that he could not sign the form. (50-53)

The local board, because of his refusal to sign the revised form, took him out of the I-O conscientious objector classification and placed him in Class I-A. (56) Upon the hearing appellant said that the local board indicated prejudice against him because he had not signed the revised form. He again in his letter of appeal stated his reasons why. He stated he could not sign the form because it would violate his conscience. (60-61)

In the motion for judgment of acquittal it was contended that the change from the I-O to the I-A was arbitrary, capricious and without basis in fact, based solely on prejudice

because Affeldt had refused to fill out the revised conscientious objector form. [15] The motion was renewed at the close of all the evidence. [45] The motion was denied. [49-50]

The question presented here, therefore, is whether the local board abused its discretion and illegally and arbitrarily removed appellant from the conscientious objector status and placed him in a classification that made him liable for unlimited military service, contrary to the act and the regulations.

III.

Upon the occasion of the personal appearance following the I-A classification by the local board, the board members asked Affeldt if he attended a theological seminary or divinity school. He said no. He showed that he had studied in the congregation of Jehovah's Witnesses. [22, 23] The board members stated that because he had not gone to a college and received a diploma he could not be considered as an ordained minister. [23] Affeldt then asserted that he was, nevertheless, entitled to the regular minister's classification. [23]

The memorandum made after the personal appearance shows that what Affeldt testified is true. The board members stated that since Affeldt "is not an ordained minister, the board members felt that a IV-D is not warranted." The board continued him in I-A. (12, 59)

In the motion for judgment of acquittal it was contended that this illegal misconception of the law denied appellant his rights to a full and fair hearing on his ministerial claim. [15] This motion for judgment of acquittal was renewed. [45] The motion was denied. [49-50]

The question presented here, therefore, is whether the local board upon the personal appearance denied appellant the right to a full and fair hearing upon his claim for classification as a minister of religion. Because the board considered that he was not a minister because he had not at-

tended a college and had no diploma and because he was not an ordained minister in their opinion.

IV.

Upon the apperance of Affeldt before the hearing officer he found the hearing officer in a great hurry and very impatient. [20-21] He asked for permission to give evidence on the difference between a pacifist and a conscientious objector for the purpose of showing that he was, nevertheless, a conscientious objector, even though not a pacifist. This request was denied. The hearing officer said that he had heard all about Jehovah's Witnesses and that he did not need to read or get any more information about them. [20-21]

Affeldt then offered the hearing officer two documents for the purpose of refuting "any adverse testimony he had concerning me." [20-21] Affeldt also brought along with him to the hearing a witness to refute anything that might be brought up by the hearing officer that was adverse or unfavorable in the report of the FBI. [42]

Upon the personal appearance Affeldt asked the hearing officer if he had any information that was unfavorable or adverse. The hearing officer said that he "had nothing against my character, as far as my former employees and all my associates had testified that my character was above reproach." [43] Carbon copies of the two documents that Affeldt offered to the hearing officer were received into evidence as defendant's Exhibit's A and B. [38]

In the motion for judgment of acquittal it was contended that the hearing officer denied appellant of a full and fair hearing on his conscientious objector claim. [15] The motion for judgment of acquittal was renewed at the close of the evidence. [45] The motion was denied. [49-50]

The question presented here, therefore, is whether the hearing officer in the Department of Justice denied appellant his right to a full and fair hearing upon his claim for classification as a conscientious objector. The reason is that

the hearing officer denied appellant the right to show the difference between a pacifist and a conscientious objector and that appellant was a conscientious objector under the law although not a pacifist.

V.

The conscientious objector claim of appellant was forwarded to the Department of Justice for appropriate inquiry and hearing. (63) A complete investigation was made by the FBI before the case was referred to the Department of Justice for the hearing on the good faith of the conscientious objections. [25-28]

At the hearing the hearing officer had the secret FBI report before him. Affeldt asked the hearing officer if he had any adverse evidence against him. The hearing officer told him no. [43]

At the trial appellant subpoenaed the FBI report. The Government produced the FBI report. [25-27] The court made an *in camera* inspection of the FBI report. It then ordered the exhibit sealed and marked for identification. Appellant moved that the FBI report be received into evidence. [28] The Government objected to the receipt of the document into evidence and claimed the privilege of the Attorney General under Order No. 3229. [29-30] The court held that a privilege claimed by the Attorney General outweighed the prejudice to the appellant that denied him and his cousel the right to use the exhibit. [32, 44]

The appellant was denied the right to use the FBI report to determine whether the hearing officer had given a fair and adequate summary of the adverse information appearing in the FBI report.

The question presented here, therefore, is whether appellant was denied his right to have the use of the FBI report upon the trial to test and determine whether the summary made by the hearing officer was fair and adequate as he had a right to do, which is guaranteed by the due-process

clause of the Fifth Amendment, by the act and the regulations.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

III.

The district court committed reversible error in refusing appellant the right to use the secret FBI investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the hearing officer of the Department of Justice was fair and adequate as required by due process of law, the act and the regulations.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

The argument under this point has been previously made to this Court in the briefs for appellant in each of the companion cases, *Batelaan* v. *United States*, No. 13,939, at pages 14 to 35 and *Francy* v. *United States*, No. 13,940, at pages 16 to 22. Reference is here made to the argument made in those briefs at the pages referred to above. It is incorporated herein as though copied at length herein. The

Court is requested to consider it as though appearing herein.

A new point involved under this point is presented here. It was not argued or discussed in the other cases. It is the position taken by the hearing officer and the Department of Justice in their report and recommendation, respectively, that appellant is not a conscientious objector because he is not a pacifist. The position is assumed by the Government that because Jehovah's Witnesses do not believe that theocratic warfare by Jehovah God is wrong they are not opposed to both combatant and noncombatant service in the armed forces. It is said that because of this view appellant is not entitled to the classification of a conscientious objector.

The act and the regulations do not extend the inquiry to objections to ecclesiastical wars. It does not make pacifism a requirement. The 1917 Act confined the benefits of the law for conscientious objectors to pacifists. This limitation was rejected in the passage of the 1940 Act. Both the 1940 and 1948 acts extended the conscientious objector rights to all religious objectors. The objection to participation in war was not confined to pacifists or to membership in churches having pacifistic beliefs. It has been so held in *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953). So also does the 1951 re-enactment known as the Universal Military Training and Service Act.—See *United States* v. *Everngam,* 102 F. Supp. 128 (D. C. W. Va. 1951).

All that is required under the act to be a conscientious objector is that the registrant show: (1) he believes in the Supreme Being; (2) his belief imposes obligations to God higher than those owed to the Government; (3) he opposes both combatant and noncombatant military service; and (4) his beliefs are not political, sociological or philosophical, but are based on a belief in God.

Appellant squarely fit the statute regardless of his saying that he was not a pacifist. He showed that he believed in complete neutrality. See the booklet entitled "Neutrality"

in his file. This religious belief brought him clearly within the terms of the law.

It is respectfully submitted, therefore, that the appellant was entitled to classification as a conscientious objector and that the denial of the claim was arbitrary, capricious and without basis in fact.

POINT TWO

The reopening of the conscientious objector classification by the local board and the giving of the I-A classification to appellant purely because he declined to fill out the duplicate conscientious objector form was arbitrary, capricious and an abuse of discretion by the local board so as to deprive appellant of his rights under Section 1625 of the regulations.

Section 1625.2 of the regulations provides for a reopening of a classification when "based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification." Here there was no change in circumstances that justified a reopening of the case like those involved in *Tyrrell* v. *United States,* 200 F. 2d 8 (9th Cir.). The sole and only reason for reopening the case and taking appellant out of the conscientious objector status was the refusal to sign the duplicate form. The trial court found that appellant had a right to refuse to sign the duplicate form. It violated the provisions of Local Board Memorandum No. 41 of the Selective Service System.

It is respectfully submitted that when the local board took appellant out of the conscientious objector classification and classified him I-A there was a denial of appellant's rights to procedural due process contrary to the act and regulations.

POINT THREE

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment.

The undisputed evidence showed that Affeldt claimed classification as a minister of religion. This claim was in addition to his claim for classification as a conscientious objector.

It appeared that the board in considering the ministerial claim upon personal appearance did not follow the law or the regulations. It illegally imported into the law a false element or factor. The reliance upon this illegal basis as to what constitutes a minister of religion caused the board to disregard the law completely. It determined the ministerial claim for exemption upon irrelevant and immaterial standards. The board thus manufactured its own definition of a minister of religion and rejected the law. So doing it deprived appellant of the right to full and fair hearing.

It has been held that where local boards upon personal appearance failed to consider the ministerial claim of the registrant because of the fact that he did not attend a theological seminary or was not trained in the same manner as the orthodox ministers are trained the registrant has been deprived of a full and fair hearing upon personal appearance.—See *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.); *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951).

The local board, therefore, denied appellant a full and fair hearing upon his claim for classification as a minister of religion. That the local board and the appeal board may have properly denied the claim for exemption is immaterial. The question here is not one of classification or whether the classification actually given was arbitrary,

capricious and without basis in fact. The contention here is not that the ministerial claim was denied without basis in fact. It is that appellant has been denied his rights to a full and fair hearing upon his personal appearance.

The fact that the appeal board reclassified appellant *de novo* is of no moment.—See *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Calif. S. D.); *United States* v. *Romano,* 103 F. Supp. 597, 600 (S. D. N. Y. 1952); *United States* v. *Zieber,* 161 F. 2d 90, 93 (3d Cir.); *Davis* v. *United States,* 199 F. 2d 689 (6th Cir.); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir.).

It is respectfully submitted, therefore, that the court below should have sustained the motion for judgment of acquittal on this ground.

POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of the case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The court below committed grievous error when it refused to permit the exhibit to be used as evidence. It merely received the exhibit and permitted it to be marked for identification, and the court alone inspected it. The trial court excluded the exhibit and permitted it to come before this Court in sealed form for the limited purpose of determining whether it was in error in excluding the exhibit.

No claim of privilege is applicable here. The Govern-

ment waived its rights under the Order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The FBI report was found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.); *United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir.); *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges as the king did before the Stuart judges in England.—*Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard its judicial function in determining whether a full and adequate summary had been made of the secret investigative report without receiving the secret report into evidence and comparing it with the summary made by the hearing officer.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953).

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

The argument under this point has been previously made to this Court in the briefs for appellant in each of the companion cases, *Batelaan* v. *United States,* No. 13,939, at pages 14 to 35 and *Francy* v. *United States,* No. 13,940, at pages 16 to 22. Reference is here made to the argument made in those briefs at the pages referred to above. It is incorporated herein as though copied at length herein. The Court is requested to consider it as though appearing herein.

A new point involved under this point is presented here. It was not argued or discussed in the other cases. It is the position taken by the hearing officer and the Department of Justice in their report and recommendation, respectively, that appellant is not a conscientious objector because he is not a pacifist. The position is assumed by the Government that because Jehovah's Witnesses do not believe that theocratic warfare by Jehovah God is wrong they are not opposed to both combatant and noncombatant service in the armed forces. It is said that because of this view appellant is not entitled to the classification of a conscientious objector.

The Government has misinterpreted Section 6(j) of the act. The clause of the act that has been misinterpreted reads: " . . . is conscientiously opposed to participation in war in any form." The modifying phrase "in any form" applies to the word "participation"; it does not modify the word "war." If it is held to modify the word "war," then the Court must give the word "war" a reasonable interpretation. Certainly Congress was not legislating on Scriptural and spiritual wars that are prophesied in the Bible to be

conducted by Almighty God. Congress was dealing only with wars between the nations of earth. It had in mind legislating regarding flesh-and-blood wars that are fought on earth. It did not have in mind spiritual wars such as that described in the Bible in the book of Revelation.

Congress intended to protect the conscientious objector having objections to participation in war, even though he was in favor of the spiritual and Scriptural wars prophetically described in the Bible that concern the time of the end. If the unreasonable interpretation placed upon the act by the Government is accepted, then it would give a basis for casting out of the protection intended by Congress every religious person who has conscientious objections to participation in war between the nations purely because he believes in the model prayer of our Lord Jesus and the battle of Armageddon spoken of in Revelation. Such a situation is intolerable. It leads to fantastically unreasonable results.

Congress had in mind limiting its exemption to persons who are conscientiously opposed (based on religious grounds) to *any form of participation* in military service or wars between the nations. It was the conscientious objection to any form of military service participation that was exempted. Congress intended to limit the exemption to those refusing to participate in any form in war because of their conscientious objections; it was for this reason that the words "in any form" were used. Congress did not intend to permit those words to be used to discriminate. It has been specifically so held in *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953).

Congress did not intend to allow the Government to hold a religious inquest and probe into the religious beliefs of the registrants about spiritual wars or God-ordained wars of the future. Congress intended to protect the religious objector. It purposed to prohibit discrimination against the objector because he might have peculiar or unique religious views that do not agree with those of the majority in the

community. The words "in any form" were not intended to be used to conduct a heresy trial. Neither the courts nor the Department of Justice are authorized to say what is orthodox in the field of religion.

The entire argument of the Government should be rejected. The argument is that because Affeldt and Jehovah's Witnesses do not have pacifistic beliefs like the 'peace churches,' they are not covered by the law. The main reason why this argument should be rejected is that it attempts to weigh the correctness of religious beliefs. This is outside the jurisdiction of the draft boards, the Department of Justice and the courts.—*United States* v. *Ballard,* 322 U. S. 78.

The expression of the religious views of Jehovah's Witnesses by the legal governing body of the group, Watchtower Bible and Tract Society, Inc., in *The Watchtower,* the magazine relied upon by the Government, is an ecclesiastical determination. This religious administrative determination cannot be questioned in secular tribunals. It must be accepted as a genuine bona fide statement of conscientious objection to war. The ecclesiastical determination is binding on the draft boards, the Government and the courts. —*Kedroff* v. *Saint Nicholas Cathedral,* 344 U. S. 94; *Watson* v. *Jones,* 13 Wall. 679, 727, 728-729; *Gonzalez* v. *Archbishop,* 280 U. S. 1, 16-17; *United States* v. *Ballard,* 322 U. S. 78, at pages 85-88.

The Court cannot compare this statement of belief with the pacifistic beliefs of other religions and thus determine whether the beliefs fit the statute. The 1940 Act and the present act rejected the pacifism or 'peace-church' definition of the 1917 Act. To do this, as suggested by the appellee, also would convert the Court into a heresy tribunal. To reject religious beliefs on conscientious objection by comparison of Jehovah's Witnesses with other religious beliefs is in violation of the First Amendment to the United States Constitution.

All the Court can inquire about is confined to what the

act says. The act says that one is a conscientious objector entitled to the benefits of the law if he shows (1) he believes in the Supreme Being, (2) his belief imposes obligations higher than those owed to the state, (3) he opposes both combatant and noncombatant military service, and (4) his beliefs are not political, sociological or philosophical but are based on a belief in God.

This position of the Government (requiring Affeldt to be opposed to the universal ecclesiastical war of Armageddon before he can get the benefits of the statute), if accepted, will make a heresy tribunal of this Court. Neither the Government nor the courts can go beyond the law passed by Congress. Congress did not make this an element of the act. Congress was concerned only with the wars between the nations. Congress did not have in mind requiring the conscientious objector to be opposed to the ecclesiastical war of Armageddon. It is to be fought by God and not by man at the end of this wicked system of things, this world. —Isaiah 26:20, 21; Revelation 16:16; 19:11-14.

This position of strict neutrality, requiring refusal to participate in international conflicts between the forces of the nations of Satan's world, is also based on the Bible ground that Christians, Jehovah's Witnesses, are ambassadors who serve notice of the advance of the great warrior, Christ Jesus, who is leading the vast army of invisible warriors of the armed forces of Jehovah God. (2 Corinthians 5:20; Revelation 19:14) He is advancing against Satan's organization, all of which, human and demon, he will destroy at the battle of Armageddon.

Jehovah's Witnesses do not participate in the modern-day armed forces of Jehovah. (2 Chronicles 20:15-17) Participation in that armed force is limited to the powerful angelic host, led by the invisible Commander, Christ Jesus. He rides at the front on his great white war mount. (Revelation 19:11) The weapons of Caesar's armed forces of this world will look like children's toys in comparison with the weapons of the invisible forces of Jehovah God. (Joel 3:9-

15; Isaiah 40:15) Jehovah's weapons of destruction at Armageddon will be used by only his invisible forces and not by Jehovah's Witnesses.

The weapons of warfare wielded by Jehovah's Witnesses are confined to instruments that cannot be used in violent warfare. They use the "sword of the spirit, which is the word of God" as his Christian soldiers and ambassadors to warn the nations of this world of the coming battle of Armageddon. That will result in the defeat of all of Satan's armies and the wiping off the face of the earth all the nations and governments of this evil world. "For it is my decision to gather nations, to assemble kingdoms, that I may pour out my wrath upon them, all the heat of my anger, for in the fire of my zeal, all the earth shall be consumed." (Zephaniah 3:8, *An American Translation;* Jeremiah 25:31-33; Nahum 1:9, 10) Therefore, they cannot give up the weapons of their warfare and take up the weapons of violence in behalf of the nations of the world of Satan. The use of such weapons by Jehovah's Witnesses and their participation in any way in the international armed conflicts would be in defiance of the unchangeable law of Almighty God.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that the early Christians at Rome refused to fight in Caesar's army. They were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of this evil world.

The present law is not like the 1917 Act, which limited the protection to the so-called peace churches or pacifist religions. Both the discussions in Congress and the reports on the 1940 Act show that Congress changed the law for conscientious objectors. Under the 1917 Act the exemption was confined to members of the peace churches. The 1940 Act eliminated the requirement of membership in a pacifist church. It let the exemption stand on an individual basis so

long as the person based his objections on belief in the Supreme Being.

Now the objections need not be pacifistic. They are sufficient when based on the Bible. Neither the 1951 Act nor the 1948 Act made reference to pacifism. Both acts did not fix the religious standard of any certain religion as the yardstick. The conscientious objection provision extends even to members of churches whose principles do not oppose war.—*United States* v. *Everngam,* 102 F. Supp. 128 (W. Va.).

The only change that the 1948 Act made was to prevent the nonreligious political, philosophical and sociological objectors from claiming the exemption.

If the path of the objector is through the Bible or through the writings of the religions of Shintoists, Moslems and Buddhists, he is entitled to his exemption. The 1948 Act protects him. The law does not prescribe any fixed path (such as pacifism) through any of the writings. It could not do so without invading religious freedom in violation of the First Amendment. To do so would make the draft boards and the courts a religious hierarchy to determine what is orthodox in conscientious objection. That Congress did not intend.

The undisputed evidence shows that Affeldt is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combatant service. He objects to doing anything in the armed forces. He will not be a soldier.

It is when the Government in its brief misconceives the words "in any form" that it jumped the track. Because of the misinterpretation of these words used in Section 6(j)

of the act the Government completely missed the intent of Congress to be "fair and just."

Congress also provided for the restricted "participation" or limited service by the noncombatant soldier in Section 6(j) of the act. It was *participation* for which the entire act was passed. It was to make all participate except those who objected to participation on conscientious religious grounds. What it was protecting, by the use of the words "in any form" in Section 6(j), was the objector to *military participation in any form.*

Congress did not intend to limit the exemption by a strange meaning placed upon the words "in any form" by the Government. That would make inconsistency and ambiguity appear on the face of the act. If Congress intended to make it necessary to have objections to war "in any form" then the limited military service afforded the conscientious objector willing to do noncombatant military service in the armed forces provided by Congress would have been defeated. Congress did not contradict itself and write Section 6(j) of the act with a patent ambiguity in it. Congress was right. The Government is wrong. The appellant is right and is supported by a fair and reasonable reading of the act.

The construction that has been placed upon the act by the Government is unreasonable. It words a forfeiture against a large segment of religion in the United States. The interpretation of the act would place all Jehovah's Witnesses entirely beyond the reach of the law. This would be notorious discrimination of the worst sort.

It was well known to the Congress, the nation, the Government and the courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were aware of the fact that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words

of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government in its brief was not intended by Congress. It had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious as well as the pacifistic objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption for all religious objectors was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra,* at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven'."

As appears above, the Selective Service System in Special Monograph No. 11, Vol I, carries the history far back, even before the American Revolution. (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act,

approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.*, pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States,* 328 U. S. 61, 68-69.

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

The interpretation of the Government in its brief in this case is narrow, unreasonable, and discriminatory. It undermines the intent of Congress. It flouts the history of fair treatment of conscientious objectors. It twists the words of the law for the purpose of illegally pulling an unpopular religion outside the protection of the law. Congress did not intend any such un-American and unscriptural discrimination. It frames mischief by unequal protection of law condemned by the law of the land and by God.—Psalm 94 : 20.

The unfairness and partiality urged by the Government are discrimination of the sort that ought to be stopped by this Court. The Supreme Court of the United States has

many times condemned discrimination of the sort urged by the Government in its brief in this case.—See *Niemotko* v. *Maryland,* 340 U. S. 268, at page 272, and *Fowler* v. *Rhode Island,* 345 U. S. 67, at pages 69-70.

It is respectfully submitted that there was no basis in fact for the denial of the conscientious objector status, that the recommendations of the hearing officer and the Department of Justice and the final classification based thereon were arbitrary, capricious and illegal.

POINT TWO

The reopening of the conscientious objector classification by the local board and the giving of the I-A classification to appellant purely because he declined to fill out the duplicate conscientious objector form were arbitrary, capricious and an abuse of discretion by the local board so as to deprive appellant of his rights under Section 1625 of the regulations.

Section 1625.1(a) provides that no classification is permanent. Section 1625.1(b) requires the registrant to report to the local board any facts that might cause the registrant to be classified differently. Section 1625.1(b) requires the local board to keep itself informed as to the status of registrant.

Section 1625.2 provides as follows:

> *"When Registrant's Classification May Be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would

> justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1625.2 of the regulations does not give the local boards authority to set aside a classification purely on speculation or prejudice or because it desires to penalize the registrant.

Section 1622.1 of the regulations provides that a registrant be selected for training and service "in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective economy."

Section 1622.1(d) specifically prohibits the local board from discriminating against a registrant. It provides: "Each such registrant shall receive equal justice." The regulation (1625.2) plainly contemplates a change in the registrant's classification and a reopening of his case only when there has been some change of a factual nature.

In this case there was no factual change at all. The only thing that happened was that the local board mailed to registrant a duplicate conscientious objector form. The registrant returned this. He explained to the board why he could not fill it out. It required him to agree to do civilian work of national importance. He stated that he was claiming classification as a minister of religion. The local board was requested to classify him as a minister and for that reason appellant returned the new duplicate form unsigned. He did not fill it out as requested by the board. The evidence also shows that when he refused to sign the form the local

board considered that appellant had defied its orders. It then attempted to penalize him by taking away his conscientious objector status, because he did not fill out the form.

The local board was not authorized to penalize appellant because of his refusal to fill out the form in this manner. The local board is not the law enforcement agency. The statute and the regulations have placed the enforcement of the law in the hands of the United States Attorney. The local board is merely a classifying agency. It was the duty of the local board to classify Affeldt according to his papers on file. The local board did not have any evidence contradicting what he said. It was the responsibility of the board to keep appellant in the conscientious objector classification.—*Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377, 378 (W. D. Ky.); *United States* v. *Pekarski,* —F. 2d— (2d Cir. October 23, 1953); *United States* v. *Alvies,* 112 F. Supp. 618, 623-625; *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953).

The mere fact that appellant was refusing to agree to do work of national importance because he was pressing his claim for classification as a minister of religion and insisting that the board classify him as such did not, in any sense of the word, justify the local board in denying the conscientious objector status. His refusal to sign the new form and agree to do work of national importance did not make a waiver of his conscientious objector claim.—*Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir.).

The only authority that the local board had under the act would have been to report appellant as a delinquent to the United States Attorney. Had he violated the law in refusing to fill out the conscientious objector form the second time he could have been prosecuted. It was entirely illegal and contrary to the act, arbitrary and capricious, and an abuse of discretion for the local board to inflict punishment upon appellant by taking his conscientious objector classification away from him. The court below found that the law did not require Affeldt to fill out the conscien-

tious objector form the second time. The special instructions from the National Headquarters of the Selective Service System to the local boards, in Local Board Memorandum No. 41, specifically prohibit a waiver of the conscientious objector claim in circumstances similar to this.

Local Board Memorandum No. 41 provides as follows:

"National Headquarters
"Selective Service System
"Washington 25, D. C.

"Local Board Memorandum No. 41
"Issued: November 30, 1951.
"As Amended: August 15, 1952.
"Subject: Withdrawal of Claim of Conscientious Objection

"1. Purpose.—The purpose of this Local Board Memorandum is to furnish information as to the circumstances under which claims of conscientious objection made by registrants should be considered to have been withdrawn.

"2. What Constitutes a Claim of Conscientious Objection.—A registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the Classification Questionnaire (SSS Form No. 100), if he has filed a Special Form for Conscientious Objector (SSS Form No. 150), or if he has filed any other written statement claiming that he is a conscientious objector.

"3. Withdrawal of Claim Must Be in Writing.—Whenever a registrant has claimed conscientious objection to war the claim shall not be considered to have been withdrawn until the registrant voluntarily submits, and there is filed in his Cover Sheet (SSS Form No. 101), a written statement signed by him specifically withdrawing

the claim. No verbal statement made by the registrant shall be considered as a withdrawal of his claim of conscientious objection. After such written withdrawal has been filed, the previous claim of conscientious objection shall be disregarded when considering the classification of the registrant.

"4. When Claim Should Not Be Considered Withdrawn.—(a) A claim of conscientious objection should not be considered to have been withdrawn even though the registrant has filed a written withdrawal of his claim if it appears that the withdrawal was not a voluntary act on the part of the registrant or that the withdrawal was induced or procured by a representative of the Selective Service System or any other Government official. The claim should not be considered withdrawn if the registrant's written withdrawal was induced by any representation or suggestion that, if he withdrew the claim, he would receive more favorable consideration of other claims, or greater weight probably would given to another claim. If the registrant has been advised that he must withdraw his claim of conscientious objection before he may appeal his classification on other grounds, the registrant's written withdrawal of his claim is not voluntary and the claim should not be considered withdrawn.

"(b) When a registrant who has claimed conscientious objection has filed a written notice of appeal in which he appealed his classification solely on the basis of any other claim or claims, such action does not constitute a withdrawal of his claim of conscientious objection. For example, if in such a case the registrant appeals only as a

minister, his claim of conscientious objection is not thereby withdrawn.

"(signed) Lewis B. Hershey
Director"

The decision of this Court in *Tyrrell* v. *United States,* 200 F. 2d 8 (9th Cir.), is not applicable here. In that case there was a change in the need for greater strength in the manpower of the armed forces from the time of the original classification to the reclassification. There was no showing here that the manpower strength of the armed forces had diminished, justifying a reopening of the classification.

The undisputed evidence in the case shows to the contrary that no such reasons were relied upon by the local board. The only reason for the reopening of the classification and the change of the conscientious objector status to liability for unlimited military service was that the local board sought to punish appellant for his failure to fill out the second conscientious objector form and agree to do work of national importance. *Tyrrell* v. *United States, supra,* is therefore inapplicable. The decision of this Court in *Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir.), supports the appellant under this point, that there has been an abuse of discretion and an arbitrary and capricious denial of due process of law in the reopening of the classification.

In *United States* v. *Ryals,* 56 F. Supp. 773, the court held that there was a denial of procedural due process of law when the local board, without a change in the factual status of the registrant, reopened and reclassified the registrant. The court found that the reopening and reclassification, changing Ryals from an exempt status to liability for unlimited military service, was arbitrary and capricious. The decision in the *Ryals* case (*United States* v. *Ryals,* 56 F. Supp. 773) rather than *Tyrrell* v. *United States,* 200 F. 2d 8 (9th Cir.), is applicable here.

It is therefore respectfully requested that the Court hold that the reopening of the case and the change of appel-

lant from the conscientious objector status to a classification that made him liable for unlimited military training and service was arbitrary, capricious and constituted an abuse of discretion on the part of the local board.

POINT THREE

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment.

The memorandum made by the local board showed the reason why the local board, upon personal appearance, refused to listen to Affeldt or consider his claim for classification as a minister of religion. The memorandum shows that Affeldt was denied a full and fair hearing before the board. The board had reached the conclusion that a registrant was required by law to attend a theological seminary before he was eligible to be classified as a minister of religion. As a result of this the evidence offered by Affeldt upon the personal appearance was rejected.

In his papers Affeldt had shown that he had satisfactorily pursued the course of study prescribed by Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. He showed that he had completed the training for the ministry prescribed by the organization of Jehovah's Witnesses. He showed in his papers that he was a minister.

The law did not require that he go to a theological school or attend a divinity school. His attendance at the Watchtower school was sufficient. He showed that he had a knowledge of the Bible and was apt to teach and preach as a minister. The organization permitted him to teach and preach as a minister. This was an ecclesiastical determina-

tion as to his schooling and qualifications. This determination could not be questioned by the board or by the courts.

Appellant's former background and schooling for the ministry cannot be questioned. This also is armored completely by an ecclesiastical determination of Jehovah's Witnesses that was binding upon the draft board. It is conclusive. It can be questioned neither by the Government nor by the courts.

Congress did not intend that a minister have his background questioned. Senator Tom Connally specifically rejected such efforts when this act was brought before Congress. He said:

> "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption. . . . Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle."—86 Cong. Rec. 10589-10590.

There is nothing in the terms of the act or the regulations that authorizes the local board to prescribe that registrants must attend theological seminaries or divinity schools before they can be considered to be ministers. The above quotation by Senator Tom Connally on the floor of the Senate indicates that Congress intended that the schooling and background of ministers of religion should not be inquired into by the members of the draft boards.

To permit the draft boards to pry into the schooling of

ministers and compare the schooling of one with that of another would allow the draft boards to set themselves up as religious hierarchies. It would permit discrimination among the various religions and between different ministers registered with the local board. Freedom of religion and the spirit of toleration in this country completely forbid such a view.

The hearing given by the local board to the appellant upon his personal appearance did not meet the requirements of the law. The local board did not comply with Section 1622.1 of the regulations. (32 C. F. R. 1622.1(d)) This regulation provides:

> "(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

It has been held that whenever a draft board inquires into and considers the religious training and background of the registrant the regulations are violated. These courts have held that when draft boards hold that it is necessary for a registrant to attend a theological seminary or divinity school as a prerequisite to claiming the exemption as a minister of religion there is a denial of a full and fair hearing upon the personal appearance.—*Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.); *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951).

It is respectfully submitted that the local board, upon the occasion of the personal appearance in this case. de-

prived Affeldt of his right to a full and fair hearing. Due process of law was denied. For this reason it was the duty of the court below to grant the motion for judgment of acquittal. The order overruling the motion and the judgment of conviction, therefore, constitute reversible error.

POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

This point has been extensively argued under Point Two of appellant's brief in *Batelaan* v. *United States,* No. 13,939, the companion case to this one. See pages 36 to 47 of that brief. Reference is here made to the argument in that case in the above mentioned pages. It is incorporated herein as though copied at length. The Court is requested to consider this argument as though it was made here.

The trial court committed reversible error in excluding the FBI report from the evidence. The court should have allowed it to be inspected and used by appellant at the trial below for the purpose of determining whether a fair and adequate summary of the FBI report was given to Affeldt.

CONCLUSION

WHEREFORE it is respectfully submitted that the judgment of the court below should be reversed. The trial court should be directed to enter a judgment of acquittal. In the alternative appellant prays that the Court reverse and remand the case for a new trial.

Respectfully submitted,

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